IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
December 4, 2007 Session

STANLEY M. HERRING, ET AL. v. COCA-COLA ENTERPRISES, ET AL.

Appeal from the Circuit Court for Bradley County
No. V-03-932 John B. Hagler, Jr., Judge

No. E2007-01295-COA-R3-CV - FILED MARCH 26, 2008

Stanley M. Herring ("Plaintiff") was employed as a truck driver for U.S. Express. U.S. Express contracted with Coca-Cola Enterprises to deliver soft drinks. In October of 2002, Plaintiff was at Coca-Cola Enterprises' facility in Bradley County, Tennessee, to pick up soft drinks for delivery to Georgia. Toward the end of the loading process, Plaintiff expressed to Coca-Cola Enterprises' employees his concern that the soft drinks had not been loaded properly. Despite repeated complaints made by Plaintiff as to the improper loading, Plaintiff nevertheless accepted the products as loaded and drove to Georgia. Upon his arrival in Georgia, Plaintiff discovered that several cases of soft drinks had fallen to the floor of the truck. While picking up the fallen soft drinks, Plaintiff was injured. Plaintiff sued Coca-Cola Enterprises for negligence. Coca-Cola Enterprises filed a motion for summary judgment claiming Plaintiff's claim was barred under Georgia law because Plaintiff had violated 49 C.F.R. § 392.9 by failing to ensure that his cargo was properly distributed and adequately secured. The Trial Court agreed and further held that Plaintiff's claim also failed because he had assumed the risk under Georgia law. Plaintiff appeals, and we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

Jimmy W. Bilbo, Cleveland, Tennessee, for the Appellants Stanley M. Herring and wife, Melinda Herring.

K. Stephen Powers, Chattanooga, Tennessee, for the Appellees Coca-Cola Enterprises and/or Johnston Coca-Cola Bottling Company a/k/a Johnston Coca-Cola Bottling Group, Inc. and/or Johnston Coca-Cola and Dr. Pepper Bottling Company and/or Coca-Cola Enterprises Bottling Companies.

OPINION

Background

This is a personal injury lawsuit filed by Plaintiff after he was injured while cleaning up soft drinks which had spilled in the back of his truck after he transported them from Tennessee to Georgia.

In October of 2002, Plaintiff was working for U.S. Express as a truck driver. Defendant Coca-Cola Enterprises[1] had entered into a delivery contract with U.S. Express. According to the complaint:

> On or about October 19, 2002, [Plaintiff], while working for U.S. Express, a trucking company which contracted with the Defendants to haul their product, was lawfully on the Defendants' premises located … in Cleveland, Bradley County, Tennessee, to pick up a load.
>
> On that date, the Defendants' agents, servants, and/or employees placed several cases on the trailer operated by [Plaintiff].
>
> [Plaintiff] left the location and drove to his destination in College Park, Georgia, to deliver the load.
>
> When the trailer was opened, it was discovered that several cases of the product which [were] in plastic bottles had fallen.
>
> Without the assistance of any other person or persons, [Plaintiff] began picking up and restacking all of the product. As he did so, he experienced a very sharp, stabbing pain in his back. Additionally, as he was picking up and restacking the product, a stack also fell onto him causing further and/or additional injuries and/or aggravation to the injury to his back.
>
> The Defendants, by and through the acts and omissions of its agents, servants and/or employees, are liable for the injuries and damages sustained by [Plaintiff] by and through the laws and principles of agency, vicarious liability and/or respondeat superior.

[1] Plaintiff sued Coca-Cola Enterprises and/or Johnston Coca-Cola Bottling Company a/k/a Johnston Coca-Cola Bottling Group, Inc. and/or Johnston Coca-Cola and Dr. Pepper Bottling Company and/or Coca-Cola Enterprises Bottling Companies. For ease of reference, we will collectively refer to the defendants as "Defendant."

> The load of product was negligently packaged by the Defendants and such was a direct and proximate cause of the injuries and damages sustained by [Plaintiff] ….

Defendant responded to the complaint, generally denying any liability to Plaintiff. Defendant averred that "[Plaintiff] himself inspected said product after it was placed in the trailer and further, that [Plaintiff] signed off on, or accepted, said load of freight." Defendant also raised the defense of Plaintiff's alleged comparative fault.

Defendant filed a motion for summary judgment claiming, among other things, that 49 C.F.R. § 392.9 applied and that Plaintiff had violated this regulation because he failed to assure himself that the cargo was properly distributed and adequately secured. Defendant also claimed that, based on a recorded statement given by Plaintiff as well as his responses given during his deposition, Plaintiff:

> was admittedly aware of the defects he alleges in the loading of soft drinks on his vehicle at the time he accepted the load for transport. Moreover, as a matter of federal law under the federal motor carrier safety regulations, it was [Plaintiff's] duty to inspect and accept or reject the load under the shipment terms and procedures utilized here, and his claim is, therefore, barred under the applicable regulations.…

The Trial Court initially denied Defendant's motion for summary judgment. According to the Trial Court, there was evidence in the record that both Plaintiff and Defendant were negligent and a violation of a statutory duty by Plaintiff should not defeat his action for negligence on behalf of Defendant so long as Plaintiff's fault was not equal to or greater than that of Defendant.

Defendant thereafter filed a motion to reconsider the denial of its motion for summary judgment. Defendant claimed, *inter alia*, that the Trial Court incorrectly applied Tennessee substantive law, as opposed to Georgia substantive law. Defendant then claimed that, pursuant to Georgia law and the applicable federal regulation, Plaintiff's violation of that federal regulation entitled Defendant to summary judgment as a matter of law.

After considering the arguments set forth by Defendant and Plaintiff's opposition to the motion to reconsider, the Trial Court entered an order reversing its previous denial of Defendant's motion for summary judgment. According to the Trial Court:

> On reconsideration, the court is of the opinion that Georgia, rather than Tennessee, law is applicable and that recovery by plaintiff is completely barred by Georgia law, if not that of Tennessee.
>
> Both parties agree, and the court concurs, that balancing the factors set forth in *Hattaway v. McKinley*, 830 S.W.2d 53, 59 (Tenn.

> 1992) results in the application of Georgia substantive law in this Tennessee case.
>
> Plaintiff argues … that the federal regulation placing on the carrier the responsibility for properly loading the cargo would, under either Georgia or Tennessee law, create a comparative fault case if defendant shipper was also guilty of negligently stacking the cargo, even though the defect was patent. Defendant argues that plaintiff is completely barred under Georgia law because plaintiff was aware of the improper loading of the cargo and, therefore, defendant had no duty to plaintiff himself for the safe loading of the cargo, that being his responsibility under the federal regulation.

The Trial Court then discussed the Tennessee Supreme Court's opinion in *Perez v. McConkey*, 872 S.W.2d 897 (Tenn. 1994). Having found no Georgia cases directly on point, the Trial Court explained that *Perez* was the "best clue" of Georgia substantive law in the relevant area. In *Perez*, one of the primary issues was the viability of the assumption of the risk doctrine with the advent of comparative fault. In discussing whether the doctrine of implied assumption of the risk survived in Tennessee following the adoption of comparative fault, the Supreme Court discussed the law of other states, stating:

> [T]he greatest blow to the doctrine of implied assumption of risk has been the overwhelming acceptance and adoption by most states of comparative fault or comparative negligence principles. Of the forty-five states, other than Tennessee, that apply principles of comparative fault, only five states - Georgia, Nebraska, Mississippi, Rhode Island and South Dakota - retain assumption of risk as a complete bar to recovery.

Perez, 872 S.W.2d at 903 (footnotes omitted)(citing *Parzini v. Center Chemical Co.*, 129 Ga. App. 868, 201 S.E.2d 808 (1973)). The Trial Court then set forth the following from *Perez*:

> The types of issues raised by implied assumption of risk are readily susceptible to analysis in terms of the common-law concept of duty and the principles of comparative negligence law.
>
> * * *
>
> While we agree that those situations described by commentators as involving the concept of primary implied assumption of risk will preclude recovery under a scheme of comparative fault, the same result will be obtained, without any unnecessary confusion, if

> Tennessee courts use the common-law concept of duty to analyze the issues.

Perez, 872 S.W.2d at 905.

After setting forth the above-discussion from *Perez*, the Trial Court concluded that the foregoing "cast[ed] doubt" on the propriety of the original ruling that Defendant was not entitled to summary judgment. The Trial Court then concluded that it was Plaintiff, rather than Defendant, who had "the duty to ensure safe loading and [he] chose to carry the cargo with the known risk that it was negligently loaded." The Trial Court further concluded that, under Georgia law, Plaintiff assumed the risk when he "left unsure that the cargo was properly loaded, and this assumption of primary implied risk completely bars plaintiff from recovery…."

Plaintiff appeals raising two issues, which we quote:

> Are defendants entitled to summary judgment, inasmuch as 49 C.F.R. § 392.9 requires a truck driver, involved in interstate commerce, to ensure that his "cargo is properly distributed and adequately secured," despite negligence of the defendants' employees in loading and inspecting the load for transport?
>
> Are defendants entitled to summary judgment, on the basis that plaintiff Stanley Herring assumed the risk of accepting the loaded cargo from Coca-Cola, and is therefore barred from recovery under Georgia law?

Discussion

In *Blair v. West Town Mall*, our Supreme Court reiterated the standards applicable when appellate courts are reviewing a motion for summary judgment. *Blair v. West Town Mall*, 130 S.W.3d 761 (Tenn. 2004). The *Blair* Court stated:

> The standards governing an appellate court's review of a motion for summary judgment are well settled. Since our inquiry involves purely a question of law, no presumption of correctness attaches to the lower court's judgment, and our task is confined to reviewing the record to determine whether the requirements of Tennessee Rule of Civil Procedure 56 have been met. *See Staples v. CBL & Assoc., Inc.*, 15 S.W.3d 83, 88 (Tenn. 2000); *Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1997); *Cowden v. Sovran Bank/Central South*, 816 S.W.2d 741, 744 (Tenn. 1991). Tennessee Rule of Civil Procedure 56.04 provides that summary judgment is appropriate where: 1) there is no genuine issue with regard to the

> material facts relevant to the claim or defense contained in the motion, and 2) the moving party is entitled to a judgment as a matter of law on the undisputed facts. *Staples*, 15 S.W.3d at 88.
>
> * * *
>
> When the party seeking summary judgment makes a properly supported motion, the burden shifts to the nonmoving party to set forth specific facts establishing the existence of disputed, material facts which must be resolved by the trier of fact.
>
> To properly support its motion, the moving party must either affirmatively negate an essential element of the non-moving party's claim or conclusively establish an affirmative defense. If the moving party fails to negate a claimed basis for the suit, the non-moving party's burden to produce evidence establishing the existence of a genuine issue for trial is not triggered and the motion for summary judgment must fail. If the moving party successfully negates a claimed basis for the action, the non-moving party may not simply rest upon the pleadings, but must offer proof to establish the existence of the essential elements of the claim.

Blair, 130 S.W.3d at 763-64, 767 (quoting *Staples*, 15 S.W.3d at 88-89).

Our Supreme Court also has provided instruction regarding assessing the evidence when dealing with a motion for summary judgment, stating:

> The standards governing the assessment of evidence in the summary judgment context are also well established. Courts must view the evidence in the light most favorable to the nonmoving party and must also draw all reasonable inferences in the nonmoving party's favor. *See Robinson v. Omer*, 952 S.W.2d at 426; *Byrd v. Hall*, 847 S.W.2d at 210-11. Courts should grant a summary judgment only when both the facts and the inferences to be drawn from the facts permit a reasonable person to reach only one conclusion. *See McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995); *Carvell v. Bottoms*, 900 S.W.2d 23, 26 (Tenn. 1995).

Staples v. CBL & Assocs., Inc., 15 S.W.3d 83, 89 (Tenn. 2000).

Defendant filed Plaintiff's deposition in support of its motion for summary judgment. This deposition leaves no doubt that Plaintiff knew before leaving the Defendant's facility that the cargo had been improperly loaded. Specifically, Plaintiff testified that the soft drinks were not loaded onto his truck properly because some of the pallets of soft drinks were only single wrapped prior to transport, and they should have been double wrapped. Plaintiff described this improper loading of the soft drinks onto his truck as follows:

> Q. Now, when you went into the facility and he was coming around the corner, what did he have on his forklift?
>
> A. Two pallets of single wrap Cokes.…
>
> Q. [B]efore that point, had you looked in the back of your trailer?
>
> A. Yes, sir.
>
> Q. What did you see?
>
> A. The last two pallets he had loaded on there before he was coming around with the last two proper pallets had not been wrapped together. They were just two individual stacks with wrap around each individual stack, which is not going to work. He knows that. I told him, You didn't wrap the last two pallets.…
>
> Q. And in your opinion what needed to be done was to wrap those last two together. Correct?
>
> A. Yes, sir. To make them solid.
>
> Q. Which gives it greater stability.
>
> A. Yes, sir.…
>
> Q. When you saw him coming around the corner on his forklift, you said to him what?
>
> A. I looked in my truck and I said, You didn't wrap these pallets together. They're not going to ride. He goes, Oh, they're going to ride. He said, I'll make sure of that. I said, No, they're not going to ride. I'd like for you to park those, pull those out, and wrap them, go ahead and wrap them together. I'm not doing that; I'm running out of time. And I said, Oh, please, man. I said, I know when I get to

> Atlanta I'm going to have a down load if you don't wrap those. He said, No, man, I ain't doing it; you can take it or leave it.
>
> Well, I was not going to argue with him at that point because he probably would have said jack the trailer down and get out of here, and then I would have been fired. So I said, No, all right, just go ahead. Just make sure the last two are wrapped. Because he hadn't even wrapped those yet.
>
> So he … goes back up there and he comes back with the shoddiest looking wrap job I ever saw in my life. You know, he attempted to wrap them. And I said, Man, this is ridiculous. I'm going to not even get to go home tonight because of this. He said, It will ride. I said, All right, shoot, go ahead.…
>
> I went on up to the front. And I told Joe, I said, Joe this is not going to ride. He said, it looks all right to me.[2] I said, Look, he only wrapped it one layer. I mean, that's just going to tear to pieces. He said, It will ride.…

The federal regulation which Defendant claims Plaintiff violated is found at 49 C.F.R. § 392.9.[3] This regulation provides, in relevant part, as follows:

> (a) General. A driver may not operate a commercial motor vehicle and a motor carrier may not require or permit a driver to operate a commercial motor vehicle unless –
>
> > (1) The commercial motor vehicle's cargo is properly distributed and adequately secured as specified in §§ 393.100 through 393.136 of this subchapter ….
>
> (b) Drivers of trucks and truck tractors. Except as provided in paragraph (b)(4) of this section, the driver of a truck or truck tractor must –

[2] In a recorded statement given prior to his deposition, Plaintiff stated that when he informed "Joe" that the wrapping around the soft drinks "doesn't look right," Joe agreed stating "No, it doesn't."

[3] The Georgia Public Service Commission has adopted 49 C.F.R. § 392.9. *See* Rule 4-1.392 of the Georgia Public Service Commission.

> (1) Assure himself/herself that the provisions of paragraph (a) of this section have been complied with before he/she drives that commercial motor vehicle …. [4]

The Trial Court's order granting summary judgment is not entirely clear as to the exact basis upon which the grant of summary judgment was made. Defendant's motion for summary judgment was based primarily upon its argument that Plaintiff's violation of the preceding federal regulation precluded any recovery by Plaintiff in this lawsuit. The Trial Court's order appears to agree with this assertion. As set forth previously, the Trial Court certainly was aware of Defendant's position when it stated in the final order that Defendant claimed it "had no duty to plaintiff himself for the safe loading of the cargo, that being his responsibility under the federal regulation." Furthermore, the Trial Court stated toward the conclusion of its order that it was Plaintiff who had "the duty to ensure safe loading and [he] chose to carry the cargo with the known risk that it was negligently loaded." Accordingly, we conclude that Plaintiff's alleged violation of 49 C.F.R. 392.9 formed one basis upon which the Trial Court believed summary judgment was appropriate.

The Trial Court also found a second basis upon which to award summary judgment. Specifically, the Trial Court determined that, pursuant to Georgia law, Plaintiff assumed the risk when he "left unsure that the cargo was properly loaded, and this assumption of primary implied risk completely bars plaintiff from recovery…."

At oral argument before this Court, Plaintiff argued that assumption of the risk was not explicitly raised in Defendant's motion for summary judgment and, therefore, the Trial Court erred when it relied on that doctrine when dismissing this case. We reject this argument because Plaintiff never raised this argument anywhere in his brief. This argument is, therefore, waived. Since Plaintiff has waived this argument, in resolving this appeal we also will consider whether, under Georgia law, Plaintiff's claim is barred by his assumption of the risk.

In *Franklin Stainless Corp. v. Marlo Transp. Corp.*, 748 F.2d 865 (4th Cir. 1984), the United States Court of Appeals for the Fourth Circuit discussed how 49 C.F.R. § 392.9 affected claims for indemnity and contribution between a shipper and a carrier as to claims brought by a third party. The *Franklin* Court stated:

> Regulations of the Interstate Commerce Commission prohibit a carrier from operating a motor vehicle unless the cargo is properly distributed and adequately secured. 49 C.F.R. § 392.9 (1979).…

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[4] Plaintiff stated at oral argument that while he agreed before the Trial Court that Georgia law applies with respect to the legal effect of Plaintiff's claimed violation of 49 C.F.R. § 392.9, he never agreed that Georgia law applied as to assumption of the risk. We find this issue to be waived because it was not addressed in Plaintiff's brief. In any event, Plaintiff offered no explanation at oral argument as to why Georgia law would apply for one substantive issue, but not the second substantive issue.

> Responsibility for obviously improper loading generally rests on the carrier, and it must indemnify the shipper even though the shipper loaded the truck. *General Electric Co. v. Moretz*, 270 F.2d 780 (4th Cir. 1959) (contract of carriage includes right to indemnity); *United States v. Savage Truck Line Inc.*, 209 F.2d 442 (4th Cir. 1953) (principal fault lay with the carrier). Imposition of liability on the carrier and its obligation to indemnify the shipper is subject to an exception arising out of the acts of the shipper. The allocation of responsibility between the shipper and the carrier for improper loading is delineated in *Savage*, 209 F.2d at 445, as follows:
>
> > The primary duty as to the safe loading of property is therefore upon the carrier. When the shipper assumes the responsibility of loading, the general rule is that he becomes liable for the defects which are latent and concealed and cannot be discerned by ordinary observation by the agents of the carrier; but if the improper loading is apparent, the carrier will be liable notwithstanding the negligence of the shipper.

Franklin, 748 F.2d at 868 (quoting *U.S. v. Savage Truck Line Inc.*, 209 F.2d 442, 445 (4th Cir. 1953)).

Regardless of the status of assumption of the risk in Tennessee, it is alive and well in Georgia. The Georgia Legislature has codified the assumption of the risk doctrine. Ga. Code Ann. § 51-11-7 provides as follows:

> § 51-11-7. Diligence of plaintiff.
>
> If the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover. In other cases the defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained.

In *Vaughn v. Pleasent*, 471 S.E.2d 866 (Ga. 1996), the Georgia Supreme Court discussed assumption of the risk as follows:

> The affirmative defense of assumption of the risk bars a plaintiff from recovering on a negligence claim if it is established that he "without coercion of circumstances, chooses a course of action with full knowledge of its danger and while exercising a free choice as to whether to engage in the act or not." In Georgia, a defendant asserting an assumption of the risk defense must establish that the

> plaintiff (1) had actual knowledge of the danger; (2) understood and appreciated the risks associated with such danger; and (3) voluntarily exposed himself to those risks.
>
> "Knowledge of the risk is the watchword of assumption of risk," and means both *actual* and *subjective* knowledge on the plaintiff's part. The knowledge that a plaintiff who assumes a risk must subjectively possess is that of the specific, particular risk of harm associated with the activity or condition that proximately causes injury. The knowledge requirement does not refer to a plaintiff's comprehension of general, non-specific risks that might be associated with such conditions or activities. As stated by Dean Prosser:
>
> > In its simplest and primary sense, assumption of the risk means that the plaintiff, in advance, has given his consent to relieve the defendant of an obligation of conduct toward him, and to take his chances of injury from *a known risk arising from what the defendant is to do or leave undone*.

Vaughn, 471 S.E.2d at 868 (citations and footnotes omitted; emphasis in the original).

In the present case, it is undisputed that Plaintiff had actual knowledge that his truck had been improperly loaded. As evident by his comments that the soft drinks were "not going to ride" and he was "going to have a down load" if the pallets were not properly wrapped, Plaintiff certainly understood and appreciated the risk of the improper loading. Notwithstanding this knowledge and appreciation of the risk, Plaintiff nevertheless proceeded to accept the soft drinks as loaded and travel to Georgia, in violation of 49 C.F.R. § 392.9. Plaintiff correctly anticipated that he would have a down load when he arrived in Georgia. A natural consequence of having a down load is that the down load is going to have to be cleaned up. The undisputed material facts demonstrate that Plaintiff, "without coercion of circumstances, [chose] a course of action with full knowledge of its danger and while exercising a free choice as to whether to engage in the act or not." *Vaughn*, 471 S.E.2d at 868; *see also Rayburn v. Georgia Power Co.*, 643 S.E.2d 385, 389 (Ga. Ct. App. 2007).

Plaintiff argues that the assurances made by Defendant's employees that the soft drinks as loaded were "going to ride" somehow amounted to "coercion" which negates Defendant's claim that Plaintiff assumed the risk. We disagree as we find no evidence of "coercion" in this record, only Plaintiff's claim of such.

In *Young v. Brandt*, 485 S.E.2d 519 (Ga. Ct. App. 1997), the plaintiff was injured while horseback riding. The plaintiff was an experienced "horsewoman" and expressed concern prior to the ride that the horse had been improperly saddled. The plaintiff was assured that she

would "be fine." *Id*. at 521. In reversing a jury verdict for the plaintiff, the Georgia Court of Appeals stated:

> [U]nder traditional assumption of the risk standards, we find the trial court erred by denying appellants' motion for a directed verdict because the evidence showed that Brandt, an experienced, highly capable horsewoman, was aware of all the dangers associated with riding Loverboy yet freely chose to ride him anyway. This constituted assumption of the risk as a matter of law. "Assumption of risk assumes that the actor, without coercion of circumstances, chooses a course of action with full knowledge of its danger and while exercising a free choice as to whether to engage in the act or not." (Citation and punctuation omitted.) *Beringause v. Fogleman Truck Lines*, 200 Ga. App. 822, 823(4), 409 S.E.2d 524.

Young, 485 S.E.2d at 522. *See also Franklin Stainless Corp. v. Marlo Transp. Corp.*, 748 F.2d 865, 869 (4th Cir. 1984)("The jury's finding that the trucker reasonably relied on Franklin's assurance about the safety of the load is tantamount to a finding that the defect was not open and obvious. *A trucker could not reasonably rely on assurances that an open and obvious defect in loading was safe*." (emphasis added)).

In *Young*, the Georgia Court of Appeals explained that "[a]lthough assumption of the risk is ordinarily a jury question …, in plain, palpable, and indisputable cases resolution of the issue by a jury is not required." *Young*, 485 S.E.2d at 522 (citations omitted); *see also O'Neal v. Sikes*, 609 S.E.2d 734, 735 (Ga. Ct. App. 2005). Plaintiff, without question, knew before leaving Defendant's business that the load was unsafe. Despite this knowledge, Plaintiff chose to drive his truck to Georgia with this unsafe load. We conclude that the present case is such a "plain, palpable and indisputable" case of assumption of the risk. The judgment of the Trial Court that Plaintiff's claim is barred because he assumed the risk is, therefore, affirmed.

We further conclude that even if Plaintiff did not assume the risk, his claim must nevertheless fail because of his clear violation of 49 C.F.R. § 392.9. As set forth in *Franklin*, *supra*, the responsibility for improper loading rests generally with the carrier and it is the carrier who has the "primary duty" to ensure safe loading. *Franklin*, 748 F.2d at 868. Because the improper loading of the soft drinks was readily apparent to Plaintiff, the responsibility for improper loading, as between Plaintiff and Defendant, does not shift to Defendant, even though it was Defendant's employees who loaded the cargo. A contrary holding would completely negate the provisions of 49 C.F.R. § 392.9. Plaintiff, as the driver of the truck, was required by 49 C.F.R. § 392.9 to ensure that his cargo was "properly distributed and adequately secured …." It is undisputed that Plaintiff not only did not do this, but knew before starting his trip that his cargo was not safely loaded. Because Plaintiff had the primary responsibility, his negligence, in essence, trumps any negligence by Defendant, at least with respect to the present lawsuit. *See Batts v. Cracker Barrel Old Country Store, Inc.*, 464 S.E.2d 829, 831 (Ga. Ct. App. 1955) ("A person cannot undertake to do what

obviously is a dangerous thing, *even if he is directed by another*, without assuming the risks incident thereto and without himself being guilty of such lack of due care for his own safety as to bar him from recovery." (emphasis in the original; citations omitted)). Thus, we likewise affirm the Trial Court's conclusion that Plaintiff's violation of 49 C.F.R. § 392.9 bars his claim against Defendant.

Conclusion

The judgment of the Trial Court is affirmed, and this case is remanded to the Trial Court for collection of the costs below. Costs on appeal are taxed to the Appellants, Stanley and Melinda Herring, and their surety.

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D. MICHAEL SWINEY, JUDGE